

7. By amending Form 10-Q (referenced in § 249.308a) by adding paragraph (c) to Item 2 of Part II prior to the Instruction to read as follows:

Note: Form 10-Q does not and these amendments will not appear in the Code of Federal Regulations

Form 10-Q

* * * * *

Part II

Item 2. Changes in Securities.

* * * * *

(c) Furnish the information required by Item 701 of Regulation S-K (§ 229.701 of this chapter) as to all equity securities of the registrant sold by the registrant during the period covered by the report that were not registered under the Securities Act other than unregistered sales made in reliance on Regulation S.

* * * * *

8. By amending Form 10-QSB (referenced in § 249.308b) by adding paragraph (c) to Item 2 of Part II prior to the Instruction to read as follows:

Note: Form 10-QSB does not and these amendments will not appear in the Code of Federal Regulations

Form 10-QSB

* * * * *

Part II

* * * * *

Item 2. Changes in Securities.

* * * * *

(c) Furnish the information required by Item 701 of Regulation S-B (§ 228.701 of this chapter) as to all equity securities of the registrant sold by the registrant during the period covered by the report that were not registered under the Securities Act other than unregistered sales made in reliance on Regulation S.

* * * * *

9. By amending Form 10-K (referenced in § 249.310) by revising Item 5 of Part II to read as follows:

Note: Form 10-K does not and these amendments will not appear in the Code of Federal Regulations

Form 10-K

* * * * *

Part II

* * * * *

Item 5. Market for Registrant's Common Equity and Related Stockholder Matters.

Furnish the information required by Item 201 of Regulation S-K (§ 229.201 of this chapter) and Item 701 of Regulation S-K (§ 229.701 of this chapter) as to all

equity securities of the registrant sold by the registrant during the period covered by the report that were not registered under the Securities Act other than unregistered sales made in reliance on Regulation S. *Provided* that if the Item 701 information previously has been included in a Quarterly Report on Form 10-Q or 10-QSB (§ 249.308a or 249.308b of this chapter) it need not be furnished.

* * * * *

10. By amending Form 10-KSB (referenced in § 249.310b) by revising Item 5 of Part II to read as follows:

Note: Form 10-K does not and these amendments will not appear in the Code of Federal Regulations

Form 10-KSB

* * * * *

Part II

* * * * *

Item 5. Market for Common Equity and Related Stockholder Matters.

Furnish the information required by Item 201 of Regulation S-B and Item 701 of Regulation S-B as to all equity securities of the registrant sold by the registrant during the period covered by the report that were not registered under the Securities Act other than unregistered sales made in reliance on Regulation S. *Provided* that if the Item 701 information previously has been included in a Quarterly Report on Form 10-Q or 10-QSB it need not be furnished.

* * * * *

Dated: October 10, 1996.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 96-26560 Filed 10-17-96; 8:45 am]

BILLING CODE 8010-01-P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 210, 228, 239 and 249

[Release Nos. 33-7355; 34-37802; FR-47; International Series No. 1021; File No. S7-19-95]

RIN 3235-AG47

Streamlining Disclosure Requirements Relating to Significant Business Acquisitions

AGENCY: Securities and Exchange Commission.

ACTION: Final rules.

SUMMARY: The Commission is adopting revisions to its rules that will streamline requirements with respect to financial

statements of significant business acquisitions in filings made under the Securities Act of 1933 and the Securities Exchange Act of 1934.

EFFECTIVE DATE: The rule revisions are effective November 18, 1996.

FOR FURTHER INFORMATION CONTACT:

Douglas Tanner, (202) 942-2960, Associate Chief Accountant, Office of Chief Accountant, or Walter Van Dorn, (202) 942-2990, Special Counsel, Office of International Corporate Finance, Division of Corporation Finance, U.S. Securities and Exchange Commission, Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to the following rules and forms under the Securities Act of 1933 (the "Securities Act")¹ and the Securities Exchange Act of 1934 (the "Exchange Act")² concerning financial statements of acquired (or to be acquired) businesses: Rule 3-05 of Regulation S-X,³ Item 310 of Regulation S-B,⁴ Item 17 of Form S-4,⁵ Item 17 of Form F-4,⁶ and General Instructions and Item 7 of Form 8-K.⁷

I. Introduction

On June 27, 1995, the Commission published for comment proposed revisions to rules and forms that would streamline reporting requirements concerning financial statements of acquired and to be acquired businesses and require quarterly reporting of unregistered equity offerings.⁸ The proposals were intended to reduce impediments to registered offerings and address certain problematic practices involving unregistered sales of equity securities of domestic reporting companies purportedly in reliance on Regulation S.⁹ A significant number of sales under Regulation S have been attributed to the inability of issuers to meet the registration disclosure requirement of providing audited financial statements of significant businesses acquired or likely to be acquired.¹⁰ The Commission is today adopting amendments to those requirements. In a companion release

¹ 15 U.S.C. 77a *et seq.*

² 15 U.S.C. 78a *et seq.*

³ 17 CFR 210.3-05.

⁴ 17 CFR 228.310.

⁵ 17 CFR 239.25.

⁶ 17 CFR 239.34.

⁷ 17 CFR 249.308.

⁸ Securities Act Release No. 7189 (June 27, 1995) [60 FR 35656] (the "Proposing Release").

⁹ 17 CFR 230.901-904. Regulation S was adopted by the Commission in 1990 to clarify the extraterritorial application of the registration requirements of the Securities Act. See Release No. 33-6863 (Apr. 24, 1990) [55 FR 18306].

¹⁰ See "Recent Problems Arising Under Regulation S," *Insights*, Volume 98, Number 8, August 1994.

issued today, the Commission is also adopting certain amendments regarding requirements for reporting unregistered sales of equity securities, including sales made under Regulation S.¹¹

The amendments adopted today will allow companies in most circumstances to provide information about significant acquisitions in Securities Act registration statements on the same basis as for Exchange Act reporting. The amendments eliminate in most cases the impediment of obtaining audited financial statements for a business acquisition more promptly than otherwise would be required. That requirement may have caused companies to forgo public offerings and to undertake private or offshore offerings. As discussed more completely in Section II, the amended rules provide that financial statements of a business acquired within the preceding 74 days or expected to be acquired in the future need not be furnished in connection with most initial and repeat offerings under the Securities Act if the business falls below a 50% significance level. Those financial statements will continue to be required to be filed in most cases on Form 8-K subsequent to the offering. In addition, as discussed more completely in Section III, the Commission is raising the thresholds of significance that determine whether financial statements of an acquired business must be provided in filings made under either the Securities Act or the Exchange Act, and the number of years for which historical financial statements must be furnished. Audited financial statements of acquired businesses for one, two or three years were required under the former rules for businesses significant at the 10%, 20%, and 40% levels, respectively. The amended rules raise those thresholds to 20%, 40%, and 50%, respectively.

II. Waiver of Financial Statements for Certain Pending and Recently Completed Business Acquisitions in Registration Statements and Proxy Statements

The amendments adopted today will eliminate in most circumstances the requirement to include in Securities Act registration statements audited financial statements for probable business acquisitions or for business acquisitions that were consummated 74 or fewer days before a registered offering of securities.¹² Although the proposed

rules would have permitted omission of those financial statements in all circumstances other than offerings by "blank check companies,"¹³ the rules as adopted provide that financial statements of probable and recently consummated business acquisitions will continue to be required in registration statements of any issuer if the acquisition would be significant above the 50% level using the tests that have been previously established.¹⁴ As was permitted prior to today's amendments, registered offerings that are not primarily of a capital raising nature and certain private placements may go forward without financial statements of an acquired business, regardless of its significance, until 75 days following the acquisition.¹⁵

The Commission received nineteen comment letters on the Proposing Release, of which seventeen generally supported conforming the disclosure requirements under the Exchange Act and the Securities Act for significant business acquisitions. Although some commenters recommended that offerings be allowed to proceed without limitation as to the size of the business acquisition, most commenters favored limiting the waiver of financial statements to acquisitions below some particular significance level. Among the commenters supporting a limit, the recommended thresholds for disclosure varied greatly, ranging from 10% to 80%.

As adopted, the amendments to Rule 3-05 of Regulation S-X and Item 310 of Regulation S-B require inclusion of the audited financial statements in registration statements only if the pending or recent acquisition exceeds the 50% significance level. The Commission believes it is an appropriate policy to strive to remove obstacles to proceeding with registered offerings despite pending or recent acquisitions, but recognizes that an acquisition could be so large relative to an issuer that investors would need financial statements of the acquired business for a reasoned evaluation of any primary capital raising transaction by the issuer. The selection of the 50% significance level reflects a weighing of

conflicting considerations in the light of comments received on the proposal.

The amended rules do not require the financial statements of businesses below the 50% significance level to be included in registration statements until 75 days after consummation of the acquisition, although registrants may choose to do so on a voluntary basis. Under the proposal, the requirement to furnish financial statements in registration statements would have been automatically waived until the 75th day *unless* the financial statements were readily available at an earlier time, which was similar to the requirement for Exchange Act reporting purposes.¹⁶ Eight commenters criticized the term "readily available" as vague and unworkable. In that regard, several commenters observed that, although an acquired business's financial statements may have been audited previously, filing of the financial statements may be delayed while consents and representations are obtained, due diligence procedures are performed, pro forma information is prepared, and compliance with all filing requirements is ascertained. While some issuers may choose to complete promptly all steps necessary to file the financial statements well in advance of the 75th day deadline, others may schedule these activities solely to ensure that the financial statements can be filed by the final date due. Because of the discretion exercisable by issuers, the "readily available" criterion would not appear to result in more prompt filing of financial statements nor would it be interpreted consistently by issuers. Accordingly, as adopted, the rule omits the "readily available" criterion for presenting financial statements during the 75-day period. A conforming change to the requirements of Form 8-K also has been adopted.¹⁷

As contemplated by the proposal, today's amendments provide that the pro forma financial information required by Regulation S-X to depict the effects of a business acquisition need not be furnished unless the financial statements of the acquiree are furnished. Article 11 of Regulation S-X is amended to conform the significance threshold for providing pro forma financial statements in connection with

filed with the Commission pursuant to Rule 424(b) [17 CFR 230.424(b)] under the Securities Act.

¹³ A "blank check company" is defined in § 230.419 of Regulation C [17 CFR 230.419(a)(2)].

¹⁴ The significance of an acquired business is evaluated based on: (i) the amount of the issuer's investment in the acquired business; (ii) the total assets of the acquired business; and (iii) the pre-tax income of the acquired business, all as compared to the comparable items in the registrant's most recent audited annual financial statements. [See 17 CFR 210.1-02(w) and 17 CFR 228.310(c)(2).]

¹⁵ See Instruction 2 to Item 7 of Form 8-K.

¹⁶ A Form 8-K reporting a significant acquisition is required to be filed within 15 days of consummation of the acquisition. If financial statements of the acquired business are not available, they are required to be filed by amendment to the Form 8-K as soon thereafter as practicable, but not later than 60 days after the initial report is filed. See General Instructions and Items 2 and 7(a)(4) of Form 8-K.

¹⁷ See revisions to Item 7 of Form 8-K.

¹¹ Release No. 34-37801 (Oct. 10, 1996).

¹² See revisions to Rule 3-05 of Regulation S-X and Item 310(c) of Regulation S-B [17 CFR 210.3-05 and 17 CFR 228.310(c)]. The date of an offering is specified as the date of a final prospectus or prospectus supplement relating to the offering as

business acquisitions to the minimum 20% significance level in Rule 3-05 and Item 310 of Regulation S-B.¹⁸

Other than the changes described herein affecting the financial statements and pro forma information required pursuant to Rules 3-05 and Article 11 of Regulation S-X and Item 310 of Regulation S-B, the amendments do not change the information required in filings with respect to significant acquisitions. For example, likely effects of a probable or recently consummated business combination are required to be discussed in Management's Discussion and Analysis, to the extent material.¹⁹ In addition, an issuer's financial statements must include disclosures regarding the terms and effects of material business combinations to the extent required by generally accepted accounting principles.²⁰

The Commission recognizes the difficulty in determining the disclosure to be made regarding significant transactions and events that occur in proximity to an issuer's capital raising activities before complete and reliable information becomes available. Issuers may conclude in some cases that an offering must be delayed until significant uncertainties are resolved, or at least until they are identified fully, while in other cases no delay is necessary because adequate disclosure can be furnished. One commenter recommended that a safe harbor be provided for disclosures pertaining to significant acquisitions until audited financial statements are available. Since a business acquisition is not fundamentally different from other significant events affecting issuers and requiring careful consideration of the appropriate disclosure to be made in Management's Discussion and Analysis and the financial statements, the Commission believes it is not appropriate at this time to address separately the need for a safe harbor.

A domestic company may proceed with a registered offering of securities without financial statements of a recent or probable acquiree in the circumstances described above, but it is required by Form 8-K to file financial

statements of each significant acquired business within 75 days of consummation of the acquisition.²¹ Although the amended rules apply to offerings of domestic and foreign issuers alike, foreign private issuers are not subject to quarterly or Form 8-K reporting rules. Several commenters believed that foreign issuers should be required to file the financial statements within some specified time after completion of a business acquisition as a condition for omission of the acquiree's financial statements in a registration statement under the new rules. However, a requirement to furnish those financial statements would modify significantly the foreign private issuer's interim and current events reporting requirements, which rely generally on home country standards and already contemplate that investors in securities of foreign private issuers will not necessarily receive the information customarily provided by domestic issuers regarding significant business acquisitions. Consequently, no amendment to require a special report by foreign private issuers is adopted.

The Commission also had proposed to eliminate the requirement that issuers provide in registration statements audited financial statements of recently acquired businesses that, in the aggregate, but not individually, are significant at the 20% level.²² Although a number of commenters supported elimination of the requirement, several commenters observed that individually insignificant businesses could be so numerous as to become material, or could be components of a broader acquisition plan that is material.

To address these concerns, the amendments adopted today provide that the acquisition of "related businesses" should be treated as a single business combination for purposes of determining the transaction's significance under Rule 3-05 and the periods for which financial statements of those businesses are required. The amendment codifies present staff interpretive practices concerning acquisitions of related businesses. The amended rule defines related businesses

as businesses under common ownership or management or whose acquisitions are conditional on each other or on a single common condition.²³

In addition, the amended rules require one year of audited financial statements of a majority of individually insignificant businesses acquired subsequent to the issuer's latest audited balance sheet date if, in the aggregate, the businesses are significant at a level exceeding 50%.²⁴ Accordingly, the amendment raises the threshold for the requirement to furnish financial statements of individually insignificant businesses from the present 20% level to 50%.

Although there may be other circumstances in which investors would want audited financial statements of individually insignificant businesses to be provided, the Commission believes that extending the requirement to other circumstances would unintentionally impose a costly and unnecessary burden. Existing rules permit the staff to exercise appropriate discretion where warranted in determining that financial statements in addition to those expressly required by a form should be provided for an adequate presentation of an issuer's financial condition, as well as to permit the omission of required financial statements where consistent with investor protection.²⁵

Consistent with the proposal, the amendments do not modify the requirement to furnish audited financial statements of a business to be acquired if securities are being registered in connection with the acquisition of that business.²⁶ In such a registration statement, however, the issuer may rely on the amended rules with respect to omission of *other* pending or recently completed acquisitions. The amended rules apply to proxy statements and registration statements under the Exchange Act, but do not change the proxy statement requirement of Item 14 of Schedule 14A to provide financial statements of a business to be acquired.²⁷ Accordingly, the financial

¹⁸ See revisions to Rule 11-01 of Regulation S-X and Item 310(c) of Regulation S-B [17 CFR 210.11-01 and 228.310(c)].

¹⁹ See Item 303 of Regulations S-K and S-B [17 CFR 229.303 and 228.303].

²⁰ Material terms, significant accounting policies applied, and certain summarized pro forma information must be included with respect to material business combination in a note to financial statements for the period in which the transaction occurs. See paragraphs 95 and 96 of *Accounting Principles Board Opinion No. 16*, "Business Combinations." Comparable summary disclosure is required in interim financial statements pursuant to Rule 10-01(b)(4) of Regulation S-X [17 CFR 210.10-01(b)(4)].

²¹ See Item 2 and Item 7 of Form 8-K [17 CFR 249.308]. Also, under the rules as revised, an issuer, other than a foreign private issuer, that omits financial statements of a recently consummated business combination from its *initial* registration statement in reliance on the new rules must furnish those financial statements, and related pro forma information, within 75 days of the consummation of the acquisition under cover of Form 8-K.

²² Under the former rules, if the businesses in aggregate exceeded the 20% level under the tests for significance, the issuer was required to furnish audited financial statements of the most recent fiscal year for a majority of the individually insignificant businesses. See Rule 3-05(b)(i) of Regulation S-X.

²³ See revisions to Rule 3-05(a)(3).

²⁴ Instructions to Item 2 of Form 8-K are amended to clarify that acquisitions of individually insignificant businesses do not result in a reporting requirement under that item unless the businesses are related businesses, as defined. See revisions to Instruction to Item 2 of Form 8-K.

²⁵ 17 CFR 210.3-13.

²⁶ Forms S-4 and F-4 do provide certain accommodations with respect to acquirees that are not reporting companies under the Exchange Act. See Item 17 in each Form [17 CFR 239.25 and 34].

²⁷ If action is to be taken with respect to a merger, consolidation, acquisition or similar matters, financial statements of an acquired business that is the subject of the action are required pursuant to Item 14 [17 CFR 240.14a-101.14].

statements of the acquiree will continue to be required in registration statements and proxy statements delivered to shareholders in connection with the solicitation of their approval of the acquisition transaction or other investment decision.²⁸

The revisions adopted today do not effect Rule 3-14 of Regulation S-X governing financial statements required for acquired operating real estate properties.²⁹ Several commenters expressed the view that clarification or modification of that rule was needed. In the future, the Commission may address generally disclosure requirements applicable to real estate partnerships, real estate investment trusts, and similar types of businesses. Because Rule 3-14 is intended to address unique features of that industry, such as the "blind pool" type of offering frequently used in the industry, the Commission has decided to consider revision of Rule 3-14 in the context of its evaluation of a more comprehensive disclosure scheme.³⁰

III. Increased Significance Thresholds for Acquiree Financial Statements

The rules amended today raise the thresholds at which an acquired business will be considered significant enough to require the provision of its audited financial statements in filings made under either the Exchange Act or the Securities Act. Issuers are required to report under Form 8-K the acquisition of a significant business within 15 days of consummation of that transaction. Prior to today's amendments, issuers were required to furnish audited financial statements of the acquired business as soon as

practicable thereafter, but no later than 60 days after the initial report on Form 8-K. Audited financial statements for one, two or three years were required if the acquired business was significant at the 10%, 20% or 40% levels, respectively.³¹ A small business issuer could omit audited financial statements of an acquired business falling below the 20% level if they were not readily available, and could omit under similar circumstances the first of two years of financial statements required if the acquired business was between the 20% and 40% significance level. Financial statements for periods preceding the two most recent fiscal years are not required in filings by small business issuers.³²

As originally proposed, the rules applicable to businesses acquired by small business issuers would be extended to all issuers, except that the present requirement applicable to all issuers other than small business issuers—that three years of audited financial statements must be furnished for acquirees exceeding the 40% significance level—would be retained.³³ The Commission requested comment as to the appropriate significance threshold for determining when financial statements that are not readily available should be waived.

As discussed above, many commenters criticized the "readily available" criterion because of the possibility of different interpretations and, therefore, different levels of disclosure based on factors such as an issuer's discretionary scheduling of activities necessary to furnish the financial statements. In addition, several commenters favored raising the significance thresholds for required financial statements and believed that a requirement for readily available financial statements at lower thresholds was unnecessary. Several commenters expressed the view that imposition of the costs of providing financial statements of acquired businesses was justified only at thresholds higher than those in place currently.

The amendments to Rule 3-05 of Regulation S-X and Item 310 of Regulation S-B adopted today do not include a "readily available" criterion, and provisions of Item 310 of Regulation S-B are amended in a conforming fashion to eliminate requirements to furnish financial statements based on

availability.³⁴ The amended rules provide that audited financial statements of an acquired business should be furnished for the most recent fiscal year if the significance of the acquiree exceeds 20%, for the most recent two years if significance exceeds 40%, and, except with respect to issuers making offerings under Regulation S-B and acquired businesses reporting annual revenues of less than \$25 million, for the latest three years if the significance exceeds 50%. No financial statements will be required for acquisitions below the 20% significance threshold.³⁵

The threshold at which audited financial statements of an acquired business are required for three years, as required for the issuer itself (except for small business issuers), has been raised from 40% to 50% in recognition of the significant burden imposed by the lower threshold. In addition, consistent with the criteria for small business issuers, financial statements for periods preceding the most recent two fiscal years would not be required for acquired businesses reporting revenues below \$25 million.³⁶

The revised rules are expected to be less subjective in their application. Also, they will accomplish the goal of reducing the burden of providing audited financial statements of acquired businesses, thereby increasing issuers' flexibility to make registered offerings without jeopardizing investor protection. Although investors will receive less information about some business acquisitions under the revised rules, the Commission believes that the benefits of the amendments outweigh that cost.

IV. Cost-Benefit Analysis

It is expected that the amendments will decrease registrants' costs and compliance burdens because the instances in which financial statements of acquired businesses and the number of years for which such financial statements are required will be reduced, enabling issuers to avoid the cost of preparing and auditing those statements. The amendments also are expected to reduce impediments to sales of securities in registered offerings, enabling companies the flexibility to

²⁸ The Commission may consider in the future certain recommendations to modify requirements for financial statements of nonreporting companies in registration statements relating to exchange offers. See Section VI.B.2 of the *Report of the Task Force on Disclosure Simplification*, published by the Commission on March 6, 1996.

²⁹ Audited income statements of significant acquired or to be acquired operating real estate properties are required to be furnished pursuant to Rule 3-14 of Regulation S-X and Item 310(e) of Regulation S-B [17 CFR 210.3-14 and 228.310(e)]. The income statements are required to be presented only for the most recent fiscal year, regardless of significance, if the property is not acquired from a related party and the registrant is not aware of any material factors relating to the specific property that would cause the reported financial information not to be necessarily indicative of future operating results. The income statements may exclude items not comparable to the proposed future operation of the property, such as mortgage interest, leasehold rental, depreciation, corporate expenses and federal and state income taxes.

³⁰ See Section IX.E. of the *Report of the Task Force on Disclosure Simplification*, published by the Commission on March 6, 1996, which discusses recommendations to streamline and update requirements of Industry Guide 5 pertaining to partnerships and REITs.

³¹ See General Instructions and Items 2 and 7 of Form 8-K.

³² See Item 310 of Regulation S-B [17 CFR 228.310].

³³ See old Item 310(c) of Regulation S-B [17 CFR 228.310(c)].

³⁴ See revisions to Item 310(c) of Regulation S-B. Also, a technical correction revises a reference in Form 8-K to paragraphs of Item 310 of Regulation S-B. See revisions to the General Instructions to Form 8-K.

³⁵ See revisions to Rule 3-05 of Regulation S-X and Item 310(c) of Regulation S-B.

³⁶ See Item 10 of Regulation S-B [17 CFR 228.10].

raise capital at a lower cost that may be available through unregistered sales.

V. Summary of Final Regulatory Flexibility Analysis

The Commission has prepared a Final Regulatory Flexibility Analysis pursuant to the requirements of the Regulatory Flexibility Act,³⁷ regarding the amendments to Rule 3-05 of Regulation S-X, Item 310 of Regulation S-B, Form S-4 and Form F-4 and Form 8-K. The analysis notes that these amendments relating to financial statement requirements for acquired businesses will provide issuers greater flexibility and efficiency in accessing the public securities markets.

As stated in the analysis, the amendments would eliminate certain requirements that a company registering securities under the Securities Act provide information, including audited financial statements, in the registration statement about significant acquisitions from such time as the acquisition is probable, and provide an automatic waiver in some circumstances for such financial statements under the Exchange Act. The reduction in expense, time and effort resulting from the elimination of this requirement will benefit all entities that issue securities in the United States, including small entities. An additional expected benefit of the amendments would be that offerings may be registered for sale in the United States in situations where hitherto investors in the United States would have been excluded due to the time and expense involved in registration. A resulting increase in registered offerings in the United States by issuers could be expected to increase ease of investment for small U.S. entities acting as investors.

As stated in the analysis, the proposed amendments would eliminate certain requirements that a company registering securities under the Securities Act provide information in a registration statement, including audited financial statements, about significant acquisitions from such time as the acquisition is probable, and would provide an automatic waiver in some circumstances for such financial statements under the Exchange Act.

It is expected that the new rules will decrease reporting, recordkeeping and compliance burdens for persons that are small entities, as defined by the Commission's rules. The Commission is aware of approximately 1,100 reporting companies that currently satisfy the definition of "small business" under Rule 157. With respect to the amended

Securities Act filing requirements, only small businesses that undertake a registered offering during the pendency of an acquisition will be affected. Of the above-referenced 1,100 companies, the Commission staff estimates that a maximum of approximately 50 companies will be affected in any single fiscal year. The Commission staff does not believe any will be negatively affected by these amendments. With respect to the amended Exchange Act reporting requirements, the Commission staff does not believe the amendments will have any significant effect on the such 1,100 companies. Therefore, the economic impact of the proposed amendments would be only to lessen the regulatory, reporting, recordkeeping and compliance burden on all reporting entities, both small and large.

A copy of the Final Regulatory Flexibility Analysis may be obtained by contacting Walter Van Dorn, Office of International Corporate Finance, Division of Corporation Finance at (202) 942-2990, U.S. Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549.

VI. Paperwork Reduction Act

In June, 1995, the staff submitted to the Office of Management and Budget ("OMB") for review proposals to amend the following information collections: Form 10, Form 8-K, Form S-1, Form S-2, Form S-3, Form SB-1, Form SB-2, Form 20-F, Form F-1, Form F-2, and Form F-3.³⁸ These information collections display an OMB control number and expiration date.³⁹ The information collections are required to be filed by companies registering securities under the Securities Act. The Commission solicited comment on the compliance burdens associated with the proposals but received no public comment on the burden estimates.

As discussed in Sections II and III of this release, some changes to the information collections are being adopted that differ from the proposed changes to such information collections. Specifically, audited annual and unaudited interim financial statements of business acquired or to be acquired will no longer be required in filings made under the Exchange Act or

Securities Act with respect to individual acquisitions below the 20% significance level or individually insignificant acquisitions below the 50% significance level. Only one year of audited financial statements, rather than two years, will be required for acquisitions falling in the 20% to 40% significance levels; and only two years, rather than three years, of audited financial statements will be required for acquisitions falling in the 40% to 50% significance levels. The amendments also permit omission of audited financial statements of acquired businesses between the 20% and 50% significance levels from registration statements and proxy materials in certain circumstances, although those financial statements will be required at a later date in a Form 8-K. Although some of the differences will increase the total annual burdens estimated at the proposing stage, other differences will decrease the burdens estimated at the proposing stage. The overall effect is that the differences will not result in any significant changes to the total burden estimates that were submitted to OMB at the proposing stage.

VII. Statutory Bases

The foregoing amendments to the Commission's rules and forms are being adopted pursuant to sections 2, 3, 4 and 19 of the Securities Act of 1933 and 3(b), 4A, 12, 13, 14, 15, 16 and 23 of the Securities Exchange Act of 1934.

List of Subjects in 17 CFR Parts 210, 228, 239, and 249

Accountants, Accounting, Reporting and recordkeeping requirements, Securities, Small businesses.

Text of Amendments

In accordance with the foregoing, title 17, chapter II of the Code of Federal Regulations is to be amended as follows:

PART 210—FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, INVESTMENT COMPANY ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

1. The authority citation for part 210 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77aa(25), 77aa(26), 78l, 78m, 78n, 78o(d), 78w(a), 78ll(d), 79e(b), 79j(a), 79n, 79t(a), 80a-8, 80a-20, 80a-29, 80a-30, 80a-37a, unless otherwise noted.

2. By amending § 210.3-05 by revising paragraphs (a)(3) and (b) to read as follows:

³⁸ There are no changes regarding the purpose, use or necessity of the information collections for which OMB approval was requested, nor are there changes to the estimates of reporting or recordkeeping burden expected to result from adoption of the proposed amendments. See the Proposing Release for estimates of changes in reporting or recordkeeping burden.

³⁹ Unless a currently valid OMB number is displayed, an agency may not sponsor or conduct or require response to an information collection pursuant to 44 U.S.C. § 3506(c)(1)(B).

³⁷ 5 U.S.C. 603 (1988).

§ 210.3-05 Financial statements of businesses acquired or to be acquired.

(a) * * *

(3) Acquisitions of a group of related businesses that are probable or that have occurred subsequent to the latest fiscal year-end for which audited financial statements of the registrant have been filed shall be treated under this section as if they are a single business combination. The required financial statements of related businesses may be presented on a combined basis for any periods they are under common control or management. For purposes of this section, businesses shall be deemed to be related if:

(i) They are under common control or management;

(ii) The acquisition of one business is conditional on the acquisition of each other business; or

(iii) Each acquisition is conditioned on a single common event.

* * * * *

(b) *Periods to be presented.* (1) If securities are being registered to be offered to the security holders of the business to be acquired, the financial statements specified in §§ 210.3-01 and 210.3-02 shall be furnished for the business to be acquired, except as provided otherwise for filings on Form N-14, S-4 or F-4 (§§ 239.23, 239.25 or 239.34 of this chapter). The financial statements covering fiscal years shall be audited except as provided in Item 14 of Schedule 14A (§ 240.14a-101 of this chapter) with respect to certain proxy statements or in registration statements filed on Forms N-14, S-4 or F-4 (§§ 239.23, 239.25 or 239.34 of this chapter).

(2) In all cases not specified in paragraph (b)(1) of this section, financial statements of the business acquired or to be acquired shall be filed for the periods specified in this paragraph (b)(2) or such shorter period as the business has been in existence. The periods for which such financial statements are to be filed shall be determined using the conditions specified in the definition of significant subsidiary in § 210.1-02(w) as follows:

(i) If none of the conditions exceeds 20 percent, financial statements are not required. However, if the aggregate impact of the individually insignificant businesses acquired since the date of the most recent audited balance sheet filed for the registrant exceeds 50%, financial statements covering at least the substantial majority of the businesses acquired shall be furnished. Such financial statements shall be for at least the most recent fiscal year and any interim periods specified in §§ 210.3-01 and 210.3-02.

(ii) If any of the conditions exceeds 20 percent, but none exceed 40 percent, financial statements shall be furnished for at least the most recent fiscal year and any interim periods specified in §§ 210.3-01 and 210.3-02.

(iii) If any of the conditions exceeds 40 percent, but none exceed 50 percent, financial statements shall be furnished for at least the two most recent fiscal years and any interim periods specified in §§ 210.3-01 and 210.3-02.

(iv) If any of the conditions exceeds 50 percent, the full financial statements specified in §§ 210.3-01 and 210.3-02 shall be furnished. However, financial statements for the earliest of the three fiscal years required may be omitted if net revenues reported by the acquired business in its most recent fiscal year are less than \$25 million.

(3) The determination shall be made by comparing the most recent annual financial statements of each such business, or group of related businesses on a combined basis, to the registrant's most recent annual consolidated financial statements filed at or prior to the date of acquisition. However, if the registrant made a significant acquisition subsequent to the latest fiscal year-end and filed a report on Form 8-K (§ 249.308 of this chapter) which included audited financial statements of such acquired business for the periods required by this section and the pro forma financial information required by § 210.11, such determination may be made by using pro forma amounts for the latest fiscal year in the report on Form 8-K (§ 249.308 of this chapter) rather than by using the historical amounts of the registrant. The tests may not be made by "annualizing" data.

(4) Financial statements required for the periods specified in paragraph (b)(2) of this section may be omitted to the extent specified as follows:

(i) Registration statements not subject to the provisions of § 230.419 of this chapter (Regulation C) and proxy statements need not include separate financial statements of the acquired or to be acquired business if it does not exceed any of the conditions of significance in the definition of significant subsidiary in § 210.1-02 at the 50 percent level, and either:

(A) The consummation of the acquisition has not yet occurred; or

(B) The date of the final prospectus or prospectus supplement relating to an offering as filed with the Commission pursuant to § 230.424(b) of this chapter, or mailing date in the case of a proxy statement, is no more than 74 days after consummation of the business combination, and the financial

statements have not previously been filed by the registrant.

(ii) An issuer, other than a foreign private issuer required to file reports on Form 6-K, that omits from its initial registration statement financial statements of a recently consummated business combination pursuant to paragraph (b)(4)(i) of this section shall furnish those financial statements and any pro forma information specified by Article 11 of this chapter under cover of Form 8-K (§ 249.308 of this chapter) no later than 75 days after consummation of the acquisition.

(iii) Separate financial statements of the acquired business need not be presented once the operating results of the acquired business have been reflected in the audited consolidated financial statements of the registrant for a complete fiscal year unless such financial statements have not been previously filed or unless the acquired business is of such significance to the registrant that omission of such financial statements would materially impair an investor's ability to understand the historical financial results of the registrant. For example, if, at the date of acquisition, the acquired business met at least one of the conditions in the definition of significant subsidiary in § 210.1-02 at the 80 percent level, the income statements of the acquired business should normally continue to be furnished for such periods prior to the purchase as may be necessary when added to the time for which audited income statements after the purchase are filed to cover the equivalent of the period specified in § 210.3-02.

(iv) A separate audited balance sheet of the acquired business is not required when the registrant's most recent audited balance sheet required by § 210.3-01 is for a date after the date the acquisition was consummated.

* * * * *

3. By amending § 210.11-01 by revising paragraphs (b) and (c) to read as follows:

§ 210.11-01 Presentation requirements.

* * * * *

(b) A business combination or disposition of a business shall be considered significant if:

(1) A comparison of the most recent annual financial statements of the business acquired or to be acquired and the registrant's most recent annual consolidated financial statements filed at or prior to the date of acquisition indicates that the business would be a significant subsidiary pursuant to the conditions specified in § 210.1-02(w),

substituting 20 percent for 10 percent each place it appears therein; or

(2) The business to be disposed of meets the conditions of a significant subsidiary in § 210.1-02(w).

(c) The pro forma effects of a business combination need not be presented pursuant to this section if separate financial statements of the acquired business are not included in the filing.

* * * * *

PART 228—INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

4. The authority citation for part 228 continues to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78l, 78m, 78n, 78o, 78w, 78ll, 80a-8, 80a-29, 80a-30, 80a-37, 80b-11, unless otherwise noted.

5. By amending § 228.310 by revising paragraphs (c) and (d)(1), removing paragraph (d)(2), and redesignating paragraph (d)(3) as paragraph (d)(2), to read as follows:

§ 228.310 (Item 310) Financial Statements.

* * * * *

(c) *Financial Statements of Businesses Acquired or to be Acquired.* (1) If a business combination accounted for as a "purchase" has occurred or is probable, or if a business combination accounted for as a "pooling of interest" is probable, financial statements of the business acquired or to be acquired shall be furnished for the periods specified in paragraph (c)(3) of this Item.

(i) The term "purchase" encompasses the purchase of an interest in a business accounted for by the equity method.

(ii) Acquisitions of a group of related businesses that are probable or that have occurred subsequent to the latest fiscal year-end for which audited financial statements of the issuer have been filed shall be treated as if they are a single business combination for purposes of this section. The required financial statements of related businesses may be presented on a combined basis for any periods they are under common control or management. A group of businesses are deemed to be related if:

(A) They are under common control or management;

(B) The acquisition of one business is conditional on the acquisition of each other business; or

(C) Each acquisition is conditioned on a single common event.

(iii) Annual financial statements required by this paragraph (c) shall be audited. The form and content of the financial statements shall be in accordance with paragraphs (a) and (b) of this Item.

(2) The periods for which financial statements are to be presented are determined by comparison of the most recent annual financial statements of the business acquired or to be acquired and the small business issuer's most recent annual financial statements filed at or prior to the date of acquisition to evaluate each of the following conditions:

(i) Compare the small business issuer's investments in and advances to the acquiree to the total consolidated assets of the small business issuer as of the end of the most recently completed fiscal year. For a proposed business combination to be accounted for as a pooling of interests, also compare the number of common shares exchanged or to be exchanged by the small business issuer to its total common shares outstanding at the date the combination is initiated.

(ii) Compare the small business issuer's proportionate share of the total assets (after intercompany eliminations) of the acquiree to the total consolidated assets of the small business issuer as of the end of the most recently completed fiscal year.

(iii) Compare the small business issuer's equity in the income from continuing operations before income taxes, extraordinary items and cumulative effect of a change in accounting principles of the acquiree to such consolidated income of the small business issuer for the most recently completed fiscal year.

Computational note to paragraph (c)(2): For purposes of making the prescribed income test the following guidance should be applied: If income of the small business issuer and its subsidiaries consolidated for the most recent fiscal year is at least 10 percent lower than the average of the income for the last five fiscal years, such average income should be substituted for purposes of the computation. Any loss years should be omitted for purposes of computing average income.

(3)(i) If none of the conditions specified in paragraph (c)(2) of this Item exceeds 20%, financial statements are not required. If any of the conditions exceed 20%, but none exceeds 40%, financial statements shall be furnished for the most recent fiscal year and any interim periods specified in paragraph (b) of this item. If any of the conditions exceed 40%, financial statements shall be furnished for the two most recent fiscal years and any interim periods specified in paragraph (b) of this item.

(ii) The separate audited balance sheet of the acquired business is not required when the small business issuer's most recent audited balance sheet filed is for

a date after the acquisition was consummated.

(iii) If the aggregate impact of individually insignificant businesses acquired since the date of the most recent audited balance sheet filed for the registrant exceeds 50%, financial statements covering at least the substantial majority of the businesses acquired shall be furnished. Such financial statements shall be for the most recent fiscal year and any interim periods specified in paragraph (b) of this Item.

(iv) Registration statements not subject to the provisions of § 230.419 of this chapter (Regulation C) and proxy statements need not include separate financial statements of the acquired or to be acquired business if it does not meet or exceed any of the conditions specified in paragraph (c)(2) of this Item at the 50 percent level, and either:

(A) The consummation of the acquisition has not yet occurred; or

(B) The effective date of the registration statement, or mailing date in the case of a proxy statement, is no more than 74 days after consummation of the business combination, and the financial statements have not been filed previously by the registrant.

(v) An issuer that omits from its initial registration statement financial statements of a recently consummated business combination pursuant to paragraph (c)(3)(iv) of this section shall furnish those financial statements and any pro forma information specified by paragraph (d) of this Item under cover of Form 8-K (§ 249.308 of this chapter) no later than 75 days after consummation of the acquisition.

(4) If the small business issuer made a significant business acquisition subsequent to the latest fiscal year end and filed a report on Form 8-K which included audited financial statements of such acquired business for the periods required by paragraph (c)(3) of this Item and the pro forma financial information required by paragraph (d) of this Item, the determination of significance may be made by using pro forma amounts for the latest fiscal year in the report on Form 8-K rather than by using the historical amounts of the registrant. The tests may not be made by "annualizing" data.

(d) *Pro Forma Financial Information.* (1) Pro forma information showing the effects of the acquisition shall be furnished if financial statements of a business acquired or to be acquired are presented.

* * * * *

**PART 239—FORMS PRESCRIBED
UNDER THE SECURITIES ACT OF 1993**

6. The authority citation for part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78w(a), 78ll(d), 79e, 79f, 79g, 79j, 79l, 79m, 79n, 79q, 79t, 80a-8, 80a-29, 80a-30 and 80a-37, unless otherwise noted.

* * * * *

7. By revising paragraph (b)(7) of Item 17 of Form S-4 (referenced in § 239.25) to read as follows:

Note: Form S-4 does not and these amendments will not appear in the Code of Federal Regulations.

Form S-4

* * * * *

**Item 17. Information with Respect to
Companies Other Than S-3 or S-2
Companies.**

* * * * *

(b) * * *

(7) Financial statements as would have been required to be included in an annual report furnished to security holders pursuant to Rules 14a-3 (b)(1) and (b)(2) (§ 240.14a-3 of this chapter) or Rules 14c-3 (a)(1) and (a)(2) (§ 240.14c-3 of this chapter), had the company being acquired been required to prepare such a report; *Provided, however,* that the balance sheet for the year preceding the latest full fiscal year and the income statements for the two years preceding the latest full fiscal year need not be audited if they have not previously been audited. In any case, such financial statements need only be audited to the extent practicable. If this Form is used for resales to the public by any person who with regard to the securities being reoffered is deemed to be an underwriter within the meaning of Rule 145(c) (§ 230.145(c) of this chapter), the financial statements of such companies must be audited for the fiscal years required to be presented pursuant to paragraph (b)(2) of Rule 3-05 of Regulation S-X (17 CFR 210.3-05).

* * * * *

8. By revising paragraph (b)(5) of Item 17 of Form F-4 (referenced in § 239.34) to read as follows:

Note: Form F-4 does not and these amendments will not appear in the Code of Federal Regulations.

Form F-4

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**Item 17. Information with Respect to
Foreign Companies Other Than
F-3 or F-2 Companies.**

* * * * *

(b) * * *

(5) Financial statements as would have been required to be included in an

annual report on Form 20-F (17 CFR 249.220f) had the company being acquired been required to prepare such a report; *Provided, however,* that the balance sheet for the year preceding the latest full fiscal year and the income statements for the two years preceding the latest full fiscal year need not be audited if they have not previously been audited. In any case, such financial statements need only be audited to the extent practicable. If this Form is used for resales to the public by any person who with regard to the securities being reoffered is deemed to be an underwriter within the meaning of Rule 145(c) (§ 230.145(c) of this chapter), the financial statements of such companies must be audited for the fiscal years required to be presented pursuant to paragraph (b)(2) of Rule 3-05 of Regulation S-X (17 CFR 210.3-05).

* * * * *

**PART 249—FORMS, SECURITIES
EXCHANGE ACT OF 1934**

9. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a, *et seq.*, unless otherwise noted;

* * * * *

10. By amending Form 8-K (referenced in § 249.308) by removing Instruction 2, by revising paragraph C.3 of the General Instructions, revising Instruction 4 of Item 2, and revising paragraph (a)(4) and Instruction 1 of Item 7 to read as follows:

Note: Form 8-K does not and these amendments will not appear in the Code of Federal Regulations.

Form 8-K

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GENERAL INSTRUCTIONS

* * * * *

**C. Application of General Rules and
Regulations**

* * * * *

3. A "small business issuer," defined under Rule 12b-2 of the Exchange Act (§ 240.12b-2 of this chapter), shall refer to the disclosure items in Regulation S-B (17 CFR 228.10 *et seq.*) and not Regulation S-K. If there is no comparable disclosure item in Regulation S-B, a small business issuer need not provide the information requested. A small business issuer shall provide the information required by Item 310 (c) and (d) of Regulation S-B in lieu of the financial information required by Item 7 of this Form.

* * * * *

**Item 2. Acquisition or Disposition of
Assets.**

* * * * *

Instructions.

* * * * *

4. An acquisition or disposition shall be deemed to involve a significant amount of assets (i) if the registrant's and its other subsidiaries' equity in the net book value of such assets or the amount paid or received therefor upon such acquisition or disposition exceeded 10 percent of the total assets of the registrant and its consolidated subsidiaries, or (ii) if it involved a business (see § 210.11-01(d)) which is significant (see § 210.11.01(b)). Acquisitions of individually insignificant businesses are not required to be reported pursuant to this item unless they are related businesses (see § 210.3-05(a)(3)) and are, in the aggregate, significant.

* * * * *

**Item 7. Financial Statements and
Exhibits.**

* * * * *

(a) * * *

(4) Financial statements required by this item may be filed with the initial report, or by amendment not later than 60 days after the date that the initial report on Form 8-K must be filed. If the financial statements are not included in the initial report, the registrant should so indicate in the Form 8-K report and state when the required financial statements will be filed. The registrant may, at its option, include unaudited financial statements in the initial report on Form 8-K.

* * * * *

Instructions. 1. During the period after a registrant has reported a business combination pursuant to Item 2 above until the date on which the financial statements specified by Item 7 above must be filed, the registrant will be deemed current for purposes of its reporting obligations under section 13(a) or 15(d) of the Securities Exchange Act of 1934. With respect to filings under the Securities Act of 1933, however, registration statements will not be declared effective and post-effective amendments to registrations statements will not be declared effective unless financial statements meeting the requirements of Rule 3-05 of Regulation S-X (§ 210.3-05 of this chapter) are provided. In addition, offerings should not be made pursuant to effective registrations statements or pursuant to Rules 505 and 506 of Regulation D (§§ 230.501 through 506 of this chapter), where any purchasers are not accredited investors under Rule 5-01(a) of that Regulation, until the audited financial

statements required by Rule 3-05 of Regulation S-X (§ 210.3-05 of this chapter) are filed. *Provided, however,* that the following offerings or sales of securities may proceed notwithstanding that financial statements of the acquired business have not been filed:

(a) Offerings or sales of securities upon the conversion of outstanding

convertible securities or upon the exercise of outstanding warrants or rights;

(b) Dividend or interest reinvestment plans;

(c) Employee benefit plans;

(d) Transactions involving secondary offerings; or

(e) Sales of securities pursuant to Rule 144 (§ 230.144 of this chapter).

* * * * *

Dated: October 10, 1996.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

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